92-1864

No. _____

Supreme Court, U.S.
FILED
MAY 24 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

BOBBY C. AKRIDGE, SR., et al.,

Petitioners,

versus

AMBAC INDEMNITY CORPORATION,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment is violated by a local government unit's issuance of bonds that are publicly advertised as "revenue bonds," but which are in fact secured, pursuant to a collateral contract, by a pledge of the full faith and credit of the governmental unit's taxing power, where state law prohibits the government unit from issuing general obligation bonds except with the approval of the electorate in a referendum and gives taxpayers the right to intervene in proceedings for validation of revenue bonds, and where neither the public hearing concerning the bond issuance nor the legal advertisements therefor provided notice to interested taxpayers that the general tax revenues of the local government would be pledged as security for the bond issue, as a result of which no taxpayers requested a referendum on the matter or sought to intervene in the bond validation proceedings.

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To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

Petitioners Bobby C. Akridge, Sr. ("Akridge"), et al., respectfully petition this Court for writ of certiorari to review the judgment and opinion of the Supreme Curt of Georgia and its order denying Akridge's Motion for Reconsideration of said judgment and opinion.

OPINIONS BELOW

None of the opinions below has been officially reported. All opinions below are reproduced in full in the Appendix to this Petition. These include the Judgment and Opinion of the Supreme Court of Georgia, an Order

Denying Reconsideration by the Supreme Court of Georgia, and a Final Judgment of the Superior Court of Berrien County, Georgia ("the Trial Court").

JURISDICTIONAL STATEMENT

The Judgment and Opinion of the Supreme Court of Georgia was rendered on February 5, 1993. Petitioner timely moved for Reconsideration, and the Supreme Court of Georgia entered its order denying the Motion for Reconsideration on February 24, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Article Nine, Section Six of the Georgia Constitution provides, in relevant part:

> The obligation represented by revenue bonds shall be repayable only out of the revenue derived from the project and shall not be deemed to be a debt of the issuing political subdivision. No such issuing political subdivision shall exercise the power of taxation for the purpose of paying any part of the principal or interest of any such revenue bonds.

Ga. Const. art. IX, § 6, ¶ 1.

Article Nine, Section Five of the Georgia Constitution provides, in pertinent part:

> **Paragraph I. Debt limitations of counties, municipalities, and other political subdivisions.**
>
> (a) The debt incurred by any county, municipality, or other political subdivision of this state, including debt incurred on behalf of any special district, shall never exceed 10 percent of the assessed value of all taxable property within such county, municipality, or political subdivision; and no such county, municipality, or other political subdivision shall incur any new debt without the assent of a majority of the qualified voters of such county, municipality, or political subdivision voting in an election held for that purpose as provided by law.

Ga. Const. art. IX, § 5, ¶ 1(a).

Section 36-82-66 of the Official Code of Georgia Annotated (Michie) (cited as "O.C.G.A.") provides:

36-82-66. Governmental liability for payment of bonds; recitation on bond.

Revenue bonds issued under this article shall not be payable from or charged upon any funds other than the revenue pledged to the payment thereof, nor shall the governmental body issuing the same be subject to any pecuniary liability thereon. No holder or holders of any such bonds shall ever have the right to compel any exercise of the taxing power of the governmental body to pay such bonds or the interest thereon, nor to enforce payment thereof against any property of the governmental body; nor shall any such bonds constitute a charge, lien, or encumbrance, legal or equitable, upon any property of the governmental body. Every bond issued under this article shall contain a recital setting forth the substance of this Code section.

O.C.G.A. § 36-82-66 (Michie 1987).

Section 36-82-76 of the Official Code of Georgia Annotated (Michie) provides:

36-82-76. Proceedings for validation of revenue bonds – Notice of hearing.

Prior to the hearing of the case, the clerk of the superior court of the county in which it is to be heard shall publish, once during each of the two successive weeks immediately preceding the week in which the hearing is to be held, a notice to the public that on the day specified in the order providing for the hearing of the case the same will be heard. Such publication shall be in the newspaper which is the official organ of the county in which the sheriff's advertisements appear.

O.C.G.A. § 36-82-76 (Michie 1987).

Section 36-82-77 of the Official Code of Georgia Annotated (Michie) provides, in relevant part:

> **36-82-77. Proceedings for validation of revenue bonds – Hearing and judgment; parties to proceedings; right of appeal; review of valuation of existing undertakings.**
>
> (a) Within the time prescribed in the order or such further time as he may fix, the judge of the superior court shall proceed to hear and determine all questions of law and of fact in the case and shall render judgment thereof. Any citizen of this state who is a resident of the governmental body which desires to issue such bonds may become a party to the proceedings at or before the time set for the hearing and any party thereto who is dissatisfied with the judgment of the court confirming and validating the issuance of the bonds or refusing to confirm and validate the issuance of the bonds and the security therefor may appeal from the judgment under the procedure provided by law in cases of injunction. Only a party to the proceedings at the time the judgment appealed from is rendered may appeal from such judgment.

O.C.G.A. § 36-82-77(a) (Michie 1987).

STATEMENT OF THE CASE

In late 1988, the Board of Commissioners of Berrien County, Georgia (the "County") and the Berrien County

Resource Recovery Development Authority (the "Authority") devised a scheme for the financing of construction of a resource recovery system in Berrien County. The arrangement called for the Authority to issue so-called "revenue bonds" to raise the necessary funds. The bonds on their face purported to be payable solely out of the revenues generated by the recycling system. However, in actuality, payment of the bonds was secured by the full faith and credit of the County's taxing power by virtue of a collateral contract between the County and the Authority, under which the County agreed to pay the Authority any deficiency between the Authority's revenues and the amount required to pay the principal and interest on the Authority's bonds. (App. 1, 10-12).

The taxpayers of Berrien County, Georgia, were never informed that their taxes were being pledged as security for payment of the so-called "revenue bonds," and no referendum was ever held to allow voters an opportunity to vote on the matter. At a public hearing concerning the proposed bond issue, those in attendance were told that the bonds would be paid for by the operator of the facility. No mention was made of the levy of the taxes to pay for the facility or of a pledge of the full faith and credit of the County. (App. 11-12).

Thereafter, on November 16 and 23, 1988, a "legal advertisement" appeared in *The Berrien Press*, a newspaper in general circulation in Berrien County, for the purpose of satisfying Georgia's statutory requirements for advertisement of revenue bond validation proceedings. This advertisement purported to notify the public of a proposed issue of "revenue bonds," and informed interested persons of the time and place of the hearing on the

validation of said bonds. The legal advertisement did not specifically advise that the "revenue bonds" would be secured by a pledge of the County's taxing power pursuant to a collateral contract between the County and the Authority. Indeed, the only reference to the contract in legal advertisement was the following:

> In said proceeding, the Court will also pass upon the validity of (1) a Contract, dated as of November 1, 1988, between the Issuer and the County, relating, among other things, to the payment of the Series 1988 Bonds. . . .

(App. 26-27).

The bond validation hearing was held on December 1, 1988. Because no taxpayers had intervened, the proceeding was uncontested and brief. No evidence was presented, and the presiding judge (who was based in another county and whose presence had been obtained upon the representation that the matter was uncontested) essentially "rubber stamped" the validation order which was presented to him, without being advised of the details of the scheme for operation and financing of the resource recovery system. (App. 1, 12-13). No one appealed the validation order within the time allowed under Georgia law, as a result of which the order became final and conclusive. (App. 1).

Akridge subsequently learned that the County's tax revenues had been pledged as security for the so-called "revenue bonds," and filed suit seeking a declaration that the collateral contract between the County and the Authority was invalid, and an injunction against the levy of any taxes by the County to pay for the revenue bonds.

Among the grounds alleged in Akridge's complaint for the relief sought were allegations that the County had unlawfully agreed to levy taxes to pay bonds without a referendum. Akridge subsequently amended his complaint to allege that the order approving the contract between the County and the Authority had been procured by fraud and should be set aside. (App. 2, 20-23).

On July 29, 1992, the trial court entered its final judgment, holding that the contract between the County and Authority was illegal, and enjoining the County from levying any taxes for purposes of paying off the bonds. (App. 9-19). In its findings of fact, the trial court specifically found that those in attendance at the public hearing on the proposed bonds had been told the bonds would be paid for by the operator of the facility, and that the public was not given notice that the validation hearing would concern the levy of taxes by the County to pay for the bonds. The trial court further found that there was a calculated effort to mislead the voters and to prevent a referendum on whether general obligation bonds should be issued by the County, and that

> the revenue bonds, with the purported agreement of the Berrien County Board of Commissioners to levy "unlimited taxes" was referred to by the underwriter and defendant AMBAC as a "back door" general obligation bond. The phrase "back door" general obligations bond was utilized to characterize the fact that a general obligation was being created without submission of same to the voters.

(App. 9-14). The court concluded that:

> [T]here was a fraud upon the court and proper notice was not given to the taxpayers . . . concerning the alleged new contract entered into and of the proposal to require the commissioners to levy "unlimited taxes" to pay for the bonds and operation of the facility. Due process was denied to plaintiffs and to the taxpayers of Berrien County.

(App. 15-16).

Respondent AMBAC appealed to the Supreme Court of Georgia. In his original and supplemental briefs on appeal, Akridge argued that he could not be bound by the judgment in the validation case since he had not received constitutionally-adequate notice that the question of a pledge of taxes would be involved in that case. (App. 28-33). The brief of *amicus curiae* Georgia Center for Law in the Public Interest similarly addressed the due process issue. (App. 34-37).

On February 5, 1993, the Supreme Court of Georgia issued its decision, holding that the legal advertisement preceding the bond validation proceeding satisfied the judgment, and that the judgment in that proceeding was *res judicata* as to the validity of the contract. (App. 1-7). Akridge moved for reconsideration, again referring to the due process issue involved in this case. (App. 38-39). The Supreme Court of Georgia denied reconsideration on February 24, 1993 (App. 8), and this petition timely followed.

REASONS FOR ALLOWANCE OF THE WRIT

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS VIOLATED BY A LOCAL GOVERNMENT UNIT'S ISSUANCE OF BONDS THAT ARE PUBLICLY ADVERTISED AS "REVENUE BONDS," BUT WHICH ARE IN FACT SECURED, PURSUANT TO A COLLATERAL CONTRACT, BY A PLEDGE OF THE FULL FAITH AND CREDIT OF THE GOVERNMENTAL UNIT'S TAXING POWER, WHERE STATE LAW PROHIBITS THE GOVERNMENT UNIT FROM ISSUING GENERAL OBLIGATION BONDS EXCEPT WITH THE APPROVAL OF THE ELECTORATE IN A REFERENDUM AND GIVES TAXPAYERS THE RIGHT TO INTERVENE IN PROCEEDINGS FOR VALIDATION OF REVENUE BONDS, AND WHERE NEITHER THE PUBLIC HEARING CONCERNING THE BOND ISSUANCE NOR THE LEGAL ADVERTISEMENTS THEREFOR PROVIDED NOTICE TO INTERESTED TAXPAYERS THAT THE GENERAL TAX REVENUES OF THE LOCAL GOVERNMENT WOULD BE PLEDGED AS SECURITY FOR THE BOND ISSUE, AS A RESULT OF WHICH NO TAXPAYERS REQUESTED A REFERENDUM ON THE MATTER OR SOUGHT TO INTERVENE IN THE BOND VALIDATION PROCEEDINGS.

The Supreme Court of Georgia, in reversing the trial court's judgment, did not overrule the trial court's factual findings regarding the type of notice that had been given in connection with the so-called "revenue bond" validation proceedings. It did not disturb the trial court's findings that persons attending a public hearing on the "revenue bonds" were told that such bonds would be paid solely by the operator of the facility, or that the subsequent legal advertisements with reference to the

bond validation proceedings failed clearly to notify taxpayers that the County's taxing power was implicated by the proposed bond issue. Yet notwithstanding its lack of disagreement with the factual underpinnings of the trial court's ruling, the Supreme Court of Georgia reached a contrary result, holding that due process had been satisfied. The Court apparently reasoned that compliance with the statutory requirements for notice of revenue bond validation proceedings was also necessarily sufficient to satisfy due process, stating:

> The December 1988 validation proceeding followed the statutory requirements of the Revenue Bond Law. See OCGA §§ 36-82-74 to 36-82-83. The superior court clerk published a public notice of the hearing in the official county organ two times during the weeks immediately preceding the hearing. See OCGA § 36-82-76. The advertisement satisfied the constitutional requirement of due process by giving residents and taxpayers adequate notice of the subject of the hearing and of their opportunity to be heard. See *Youngblood v. State*, 259 Ga. 864, 867 (388 S.E.2d 671) (1990); *Dawson v. Hospital Auth.*, 212 Ga. 146 (91 S.E.2d 12) (1956). Despite the taxpayers' claim that they were not aware taxes could be levied, the contract and validation order state that the county may levy ad valorem taxes on all taxable property in the county to fulfill the county's obligations under the contract.

(App. 4). Thus, the court concluded that since the "revenue bond" proceedings were conducted in accordance with the statute, they were final and conclusive, and since the final order entered in those proceedings addressed

the contract pledging the County's taxing power as well as the bonds themselves, the order was *res judicata* as to the validity of the contract as well as to the bonds.

The Supreme Court of Georgia's analysis fails to address the issues implicated by the due process clause. It is not enough to say that a party is bound by a prior judgment addressing a particular issue unless that party was or should have been a party to the previous case. Merely because the order in the bond validation proceeding purported to approve the contract pledging the County's tax revenues as security does not resolve the due process question unless it can be shown that Akridge or other taxpayers knew or should have known that a pledge of tax revenues would be involved in the proceedings. Regardless of whether or not the notice given was sufficient to satisfy the Georgia statutes pertaining to validation of revenue bonds, Akridge cannot be bound by the prior judgment unless the notice given was constitutionally sufficient to inform him that the case was not a pure "revenue bond" proceeding, but also involved a collateral pledge of the County's taxing powers.

Viewed under constitutional principles, the notice provided in the validation proceedings was grossly inadequate for this purpose. This Court has declared that to meet the requirements of due process, notice must be reasonably calculated to convey the necessary information to interested parties:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

> and afford them an opportunity to present their objections. . . . *The notice must be of such nature as reasonably to convey the required information* . . . and it must afford a reasonable time for those interested to make their appearance. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." . . .
>
> But *when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.* The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . .
>
> or, when conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314-15 (1950) (emphasis added).

The notice employed in the instant case was not designed to inform interested taxpayers that the County's taxing power was being pledged, and the form of notice utilized belies any genuine desire to provide such information. To the contrary, the notice evidences an intention to keep taxpayers uniformed until it was too late to stop

the proposed financing scheme for the resource recovery system. For one thing, the description of the proposed bonds as "revenue bonds" was inherently misleading, and did nothing to alert citizen-taxpayers that the full faith and credit of the County's taxing authority was being pledged. Georgia law forbids "revenue bonds" to be paid out of general tax revenues. Ga. Const. Art. IX, § 6, ¶ 1; O.C.G.A. § 36-82-66 (Michie 1987). Therefore, by describing the bond issue as a "revenue bond" without any reference to a pledge of the County's full faith and credit, the notice tended to alleviate, rather than raise, any concerns the citizens of Berrien County may have had about protecting their wallets from excessive government indebtedness. Especially in conjunction with the fact that some citizens had been expressly told at an earlier public hearing that the bonds would be paid in full by the facility operator, the form of notice utilized in this case seems to have been designed more to mislead the populace than reasonably calculated to apprise them that a pledge of the County's taxing power was sought as security for the so-called "revenue bonds."

Under Georgia law, citizen-taxpayers are required to approve by referendum any general obligation bond issue that is proposed to be payable out of general tax revenues. Ga. Const. Art. IX, § 5, ¶ 1(a). Furthermore, even insofar as pure revenue bonds are concerned, interested taxpayers have the right to intervene. O.C.G.A. § 36-82-77(a) (Michie 1987). Thus, Akridge and others like him could have intervened in the bond validation proceedings and objected to the so-called "revenue bonds" as the "back door general obligation bonds" that they were, had they been given proper notice of what was

actually involved in the proceedings. However, because of the lack of any constitutionally adequate notice, no taxpayers intervened, as a result of which the judgment in the validation case is now characterized as *res judicata*. This Court should not countenance such an unconscionable violation of due process principles.

It is true that the rights of Akridge and other Berrien County citizens to be free of burdensome governmental debt that has not been approved by the electorate are derived from Georgia rather than federal law. Such rights are nevertheless entitled to protection against deprivation under the due process clause of the federal constitution. This Court has long recognized the principle that certain substantive property rights may be creatures of state law, but that once such rights are established, the degree of protection to which they are entitled is a matter of federal constitutional law. *E.g., Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972). So in the instant case, while Georgia law initially affords Akridge and those similarly situated certain immunities from tax liability to pay off "revenue bonds," the federal constitution guarantees that such rights cannot be taken away without proper notice and an opportunity to be heard.

On several occasions, the Supreme Court of Michigan has held that interests similar to those asserted by Akridge are deserving of constitutional protection and cannot be taken away by procedures wherein the notice employed fails to comport with due process. In *Ridenour v. County of Bay,* 366 Mich. 255, 114 N.W.2d 172 (1962), the court held that statutes providing for notice by newspaper publication of bond validation proceedings failed to measure up to the demands of due process. The court

relied upon this Court's holding in *Mullane v. Central Hanover Trust Co., supra,* to require that notice must be given in a manner reasonably calculated to provide actual notice to interested parties. Reasoning that it was both possible and practicable to provide personal notice to all record owners of property who might bear the burden of paying off the bond, the court held that notice by publication was inadequate.

It appears that subsequent Michigan cases have since receded somewhat from the position that notice by publication is constitutionally deficient in bond validation proceedings. In *Harter v. City of Schwartz Creek,* 68 Mich. App. 403, 242 N.W.2d 792 (1976), the court held that notice by publication of bond validation proceedings was constitutionally permissible, in view of the burdens attendant upon providing personal notice to all interested parties. Still, the court continued to recognize that the sufficiency of notice in such proceedings is not solely a question of statutory compliance, but that the requirements of due process must also be met.

In *Alan v. County of Wayne,* 388 Mich. 210, 200 N.W.2d 628 (1972), the Supreme Court of Michigan addressed a question which is not distinguishable from the issue raised in the instant case in any material respect. That case also involved a governmental effort to issue what were essentially general obligation bonds while advertising the same as merely revenue bonds which would not be a liability against the County's tax revenues. In *County of Wayne,* as here, there was a state law provision prohibiting the use of general tax revenues to pay off "revenue bonds." Just as in the instant case, the County of Wayne sought to "guaranty" the so-called "revenue bonds"

which were proposed to be issued by a local development authority. (Whereas the guaranty in the instant case takes the form of a contract in which the County agreed to pay any amount necessary to extinguish the bonds, in exchange for an unspecified consideration, the guaranty in the *County of Wayne* case took the form of a lease, in which the county agreed unconditionally to lease the proposed stadium for an amount sufficient to pay off the bonds, regardless of whether or not any actual tenants who would use the stadium could be obtained.) Just as in the instant case, where it is conceded that the so-called "revenue bonds" are actually "back door general obligation bonds," it was admitted in *County of Wayne* that the type of "revenue bond" which was proposed to be issued was "not truly a revenue bond." 200 N.W.2d at 639 n.4. And just as in the instant case, the supporters of the bond issue in *County of Wayne* told one thing to the taxpayers (i.e., that the bonds were revenue bonds, for which the county's general funds would not be liable), and another to the prospective purchasers of the bonds (i.e., that the bonds were general obligations of the County, backed by its full faith and credit).

In condemning such misleading government actions as a gross violation of due process, the Michigan Supreme Court observed that the published notice which was given appeared designed more to confuse than enlighten the electorate. The express reference to the "revenue bonds" tended to indicate that the County's taxing powers would not be implicated, and even though the notice also referred to "rentals" to be paid by the County to the stadium authority, the court held this was not sufficient to alert taxpayers of the possible use of tax

revenues to pay rent under an unconditional lease agreement, as such reference was reasonably susceptible to the interpretation that the county would merely be obligated to pass along whatever rentals it might receive from whatever tenants the stadium might acquire. 200 N.W.2d at 692. The court concluded:

> The notice here is defective in both its method of reaching taxpayers and its substance.
>
> The notice is defective in its method of reaching taxpayers because the right to petition cannot be created and cut off by fine print in the back of a newspaper.
>
> . . . .
>
> We do not hold that due process requires personal notification of every taxpayer, nor do we hold that there must be any mailed notice or *personal* notice to everyone. *Mullane* holds only that the method of notice chosen must give reasonable assurance of actually giving notice in light of other available means:
>
> > "The statutory notice to known beneficiaries is inadequate, *not because in fact it fails to reach everyone,* but because *under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand . . . Mullane,* 319, 70 S.Ct. 660.
>
> The kind of notice required depends on the circumstances of the case and the availability of other means in both a theoretical and economic sense. Here, for example, there is involved not merely a true revenue bond where there is no chance of taxation, but rather bonds secured by the general, unlimited taxing power of the

County. The bonded project involves the expenditure of substantial sums of money. It is not unreasonable under the circumstances to consider other available means of notice such as full page advertisements; television; radio; or combination of any of the above. The method may vary but the question always to be asked of itself by the government is whether it has chosen a method it would choose if it were really desirous of actually informing the greatest number of electors of what their rights are.

2) *The Notice here is also defective in substance because it fails to inform the reader of its purpose and because it is misleading.*

The purpose of the notice is to create and determine a method of objecting to a bond issue by petitioning for a vote. That purpose is not served by a simple statement that the notice is given because it is required to be given. It is no answer here to say that these notices "conform to accepted practice in building authority projects." Customary process is not necessarily due process.

. . . .

Where public officials are acting under a constitutional and statutory duty to give notice to the public of what the government proposes, and especially where it concerns rights of electors respecting important undertakings of government such as the issuance of bonds secured by taxing powers, then the government and its public officials, in the exercise of the duty of informing, occupy a position of trust and a fiduciary standard should be applied to them. Cf. Barkey v. Nick, 11 Mich.App. 381, 385, 161 N.W.2d 445 (1968).

> In giving notice to taxpayer regarding public securities, to comport with due process *the notice must be phrased with the general legal sophistication of its beneficiaries in mind. As phrased it must not make any misleading or untrue statement; or fail to explain, or omit any fact which would be important to the taxpayer or elector in deciding to exercise his right. In short, the notice may not be misleading under all the circumstances.*

200 N.W.2d at 696-97 (some emphasis in original, other emphasis added).

The Supreme Court of Michigan in the *County of Wayne* case reached one result on the due process issue. The Supreme Court of Georgia, faced with essentially the same issue in the instant case, reached another. This Court should accept jurisdiction in this case to resolve the conflict between decisions of the highest courts of two states on an important question of federal law which has yet to be addressed by this Court. The question of the process necessary to deprive taxpayers of protections against excessive government debt will attain increasing importance in coming years. With the federal deficit reaching nightmarish proportions and taxpayers seeking greater accountability for public spending at all levels of government, it must be clearly established that state law protections against fiscal irresponsibility give rise to property interests deserving of constitutional protection, and that citizens cannot be hoodwinked out of such protections as a result of deceptive practices such as "back door general obligation bonds." This Court can and should hold that taxpayers such as Akridge have a constitutional right to be informed before being subjected to the

burden of general obligation bonds, and that a notification process which fails to yield such information is constitutionally deficient.

CONCLUSION

For all the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: February 5, 1993

S92A1513. AMBAC INDEMNITY CORP. v. AKRIDGE.

FLETCHER, Justice.

Ambac Indemnity Corporation, an insurer of municipal bonds, appeals from the trial court's order declaring invalid a contract between Berrien County and the Berrien County Resource Recovery Development Authority and granting a permanent injunction prohibiting the levy of taxes to pay for revenue bond for a recycling facility. We conclude that the validation order issued December 1, 1988, in the bond validation proceeding is conclusive on the validity of the contract and reverse.

The county and authority entered into an intergovernmental contract in November 1988 for the construction of a resource recovery system in Berrien County. The authority agreed to issue two million dollars in revenue bonds to finance and operate the system and to provide garbage and solid waste disposal services. In return, the county agreed to pay the authority any deficiency between the authority's revenues and the amount required to pay the principal and interest on the authority's bonds with the deficit to come from the county's general fund or tax proceeds. This contract served as security for the bonds. The Superior Court of Berrien County validated the contract and bonds in a court proceeding on December 1, 1988. *State v. Berrien County Resource Recovery Dev. Auth., et al.*, Civil Action No. 88-C-332. Proper notice of the hearing was published; no one intervened, objected, or appealed the validation order.

Following the validation, bonds were sold and AMBAC issued a municipal bond insurance policy guaranteeing payment of the bonds.

Bobby C. Akridge, a taxpayer and county resident, filed this action in October 1991 against the Berrien County Board of Commissioners and the county tax commissioner, seeking declaratory and injunctive relief. AMBAC intervened and moved to dismiss the complaint on grounds of *res judicata*, citing the validation order. In March 1992, Akridge moved to set aside the validation order on the grounds of fraud and mistake. The trial court found the bond validation proceeding was not controlling, declared the contract invalid, and granted a permanent injunction prohibiting the county from making payments to the authority or levying or collecting any tax to make payments. AMBAC appeals.

1. The State Constitution requires the General Assembly to provide for "incontestable and conclusive" validation of revenue bonds. **Ga. Const.** Art. IX, Sec. VI, Par. IV (1983). The Revenue Bond Law describes the finality of a judgment validating revenue bonds:

> If no appeal is filed within the time prescribed by law or if an appeal is filed and the judgment is affirmed on appeal, the judgment of the superior court confirming and validating the issuance of the bonds and the security therefor shall be forever conclusive against the governmental body upon the validity of such bonds and the security therefor.

OCGA § 36-82-78 (1987). This Court has held consistently that this statutory provision prevents any collateral attack by the county, county residents, or taxpayers who had

proper notice of the validation proceedings but chose not to intervene. *See, Charlton Dev. Auth. v. Charlton County,* 253 Ga. 208, 209 (317 SE2d 204) (1984); *Gibbs v. City of Social Circle,* 191 Ga. 422, 424 (12 SE2d 335) (1940). " 'The judgment of validation . . . from which no timely appeal was filed, was conclusive on the question of the validity of the bonds *and the security therefor.*' (Emphasis supplied.)" *Charlton County,* 253 Ga. at 209 [quoting *Miller v. Columbus,* 229 Ga. 234, 236 (190 SE2d 535) (1972).][1]

The December 1988 validation proceeding followed the statutory requirements of the Revenue Bond Law. *See,* **OCGA §§** 36-82-74 to 36-82-83. The superior court clerk published a public notice of the hearing in the official county organ two times during the weeks immediately preceding the hearing. *See,* **OCGA §** 36-82-76. The advertisement satisfied the constitutional requirement of due process by giving residents and taxpayers adequate notice of the subject of the hearing and of their opportunity to be heard. *See, Youngblood v. State,* 259 Ga. 864, 867 (388 SE2d 671) (1990); *Dawson v. Hospital Auth.,* 212 Ga. 146 (91 SE2d 12) (1956). Despite the taxpayers' claim that they were not aware taxes could be levied, the contract and validation order state that the county may levy ad valorem taxes on all taxable property in the county to fulfill the county's obligations under the contract. These

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[1] See also *Cox v. Georgia Educ. Auth.,* 225 Ga. 542, 544 (170 SE2d 240) (1969) (rejecting subsequent equitable petition challenging the constitutionality of judgment validating bonds that the Georgia Education Authority issued on behalf of the Ware County Board of Education); *Dawson v. Hospital Auth.,* 212 Ga. 146 (91 SE2d 12) (1956) (affirming revenue certificates issued under the Hospital Authority Act of 1941).

obligations require the county to pay the authority for any revenue deficiency necessary to meet the payment of principal and interest on the bonds.[2]

Because the validation proceedings followed the statutory procedure, the superior court's validation order of December 1, 1988, is conclusive on the validity of the contract between the county and authority. *See,* **OCGA** § 36-82-78. The order found that the contract was "a legal, valid, binding and enforceable obligation" of the county and that the county could levy taxes to fulfill its obligations under the contract. No one appealed the order. Having chosen not to intervene and appeal the validation order, Akridge is precluded from a collateral attack on the security for the bonds. *See, Charlton County,* 253 Ga. at 209; **OCGA § 9-11-60** (a) (Supp. 1992).

This preclusion is necessary to protect the ability of governmental bodies to obtain long-term financing in the bond market. Potential purchasers would be reluctant to invest in the state's bonds without the assurance that the revenue bonds and their security are not subject to collateral attacks after a court with proper jurisdiction has entered a final validation order. Any perceived risk in the revenue bonds as an investment would impede the ability of state and local governments to finance needed public improvement projects.

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[2] The contract also requires the county to make additional payments to assure the continuous operation of the system unless the county and authority agree that it is in the best interests of the county's citizens to waive or amend the requirement.

2. The taxpayers' attempt to set aside the validation order for fraud must also fail. A final judgment validating revenue bonds cannot be overturned based on a motion to set aside under **OCGA** § 9-11-60 (d). " ' Where there is a variance between an Act of the General Assembly and a Constitutional provision, the Constitutional provision prevails.' " *Bugden v. Bugden,* 224 Ga. 517, 518 (162 S.E.2d 719) (1968) [quoting *Whitman v. State,* 96 Ga. App. 730, 732 (101 S.E.2d 621) (1957).] Thus, the constitutional mandate that validation proceedings are conclusive takes precedence over the procedural rule that allows judgments to be set aside for fraud, accident, or mistake.

3. The validation order correctly found that the county has the authority to contract with the Berrien County Resource Recovery Development Authority to provide services for garbage and solid waste disposal in the county. The intergovernmental contracts clause of the constitution provides that any county

> may contract for any period not exceeding 50 years . . . with any . . . public authority for joint services, for the provision of services, or for the joint or separate use of facilities or equipment; but such contracts must deal with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide.

Ga. Const. Art. IX, Sec. III, Par. I. The Georgia Constitution grants counties the power to provide "[g]arbage and solid waste collection and disposal." **Ga. Const.** Art. IX, Sec. II, Par. III. The Resource Recovery Development Authorities Law grants counties and resources recovery development authorities "the authority to enter into contracts, lease agreements, or other undertakings relative to

the furnishing of project activities and facilities . . . for a term not exceeding 50 years." **OCGA § 36-63-8 (a) (5).** Therefore, the agreement between Berrien County and the authority is a valid intergovernmental contract under the State Constitution and statutes. As an intergovernmental contract, it does not constitute a debt in violation of the constitutional clause limiting local debt. *See, Sheffield v. State School Bldg. Auth.*, 208 Ga. 575, 581 (68 SE2d 590, 595) (1952); **Ga. Const.** Art. IX, Sec. V, Par. I. Because the contract is valid and the bond validation order is conclusive, the trial court erred in granting injunctive relief and in denying AMBAC's motion to dismiss with prejudice.

Judgment reversed. Clarke, C.J., Hunt, P.J., Benham, Sears-Collins and Hunstein, JJ., and Judge Frank C. Mills, III, concur.

S92A1513. AMBAC INDEMNITY CORP V. AKRIDGE.

CLARKE, Chief Justice, concurring.

I concur in the majority opinion. I write only to emphasize the words "forever conclusive" as they appear in the Georgia Constitution relating to bond validation orders. This plainly states a policy establishing finality of judgments which validate bonds.

Division Two of the majority opinion discusses the superiority of the Constitution over statutes. In this connection I note an obvious truth that a statue is a mandate of the legislature as the people's representatives. A constitutional provision is not only a mandate of the people's representatives, but also of the people themselves. When the people ratify a constitutional provision, they speak in the most solemn voice they have at their command. The courts must hear that voice, and it must prevail. This opinion simply holds that the voice of the people is heard, and it is followed.

SUPREME COURT OF GEORGIA

ATLANTA FEBRUARY 24, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S92A1513

AMBAC INDEMNITY CORPORATION v. BOBBY C. AKRIDGE, SR., ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Clarke, C.J., Hunt, P.J., Benham, Fletcher, Sears-Collins and Hunstein, JJ., and Judge Frank C. Mills, III, concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

IN THE SUPERIOR COURT OF BERRIEN COUNTY
STATE OF GEORGIA

BOBBY C. AKRIDGE, SR., et al. Plaintiffs, vs. BERRIEN COUNTY BOARD OF COMMISSIONERS and LORENE T. DORMINEY, in her official capacity as Tax Commissioner of Berrien County, Georgia, Defendants, vs. AMBAC INDEMNITY CORPORATION, Defendant-Intervenor.	*	CIVIL ACTION NO. 91-C-355

ORDER OF COURT

This case is before the Court for final ruling upon the merits pursuant to the request of Intervenor AMBAC. All parties having agreed to a ruling, by the Court, and based upon the record, the Court finds as follows:

FINDINGS OF FACT

-1-

In 1988, the Berrien County Board of Commissioners borrowed approximately $1,000,000.00 to purchase a Lundell recycling facility. No referendum was held to allow voters an opportunity to vote on the debt. No funds

existed for repayment of the monies within the calendar year.

-2-

The Chairman of the Berrien County Board of Commissioners, took the initiative with regard to the purchase of the Lundell System and informed the other two (2) commissioners that the recycling facility would pay for itself. The other two (2) commissioners agreed to let the Chairman handle the purchase of the recycling facility.

-3-

In 1988, a public hearing was held to discuss the issuance of revenue bonds for the recycling facility. The revenue bonds were to be channeled through the Berrien County Resource Recovery Development Authority even though the equipment was already purchased by the Berrien County Board of Commissioners and the recycling project was, in fact, a project of the Berrien County Board of Commissioners rather than a project of the Berrien County Resource Recovery Development Authority.

-4-

At the public hearing held on the proposed issuance of revenue bonds, the Berrien County Board of Commissioners and Berrien County Resource Recovery Development Authority officials informed the public that the bonds would be paid for by the operator of the facility. No mention was made of the levy of taxes to pay for the facility or of a pledge of the full faith and credit of Berrien County.

-5-

A contract was entered into between the Berrien County Board of Commissioners and the Berrien County Resource Recovery Development Authority on September 19th, 1988. The Contract provided for supplementation of operating expense by the Berrien County Board of Commissioners but there was no mention made of the levy of taxes for payment of bonds or of a pledge of the full faith and credit of Berrien County.

-6-

Another contract was signed by the chairman of the Berrien County Board of Commissioners on or around November 11th, 1988 and backdated to November 1st, 1988. This contract contained language that sought to require the Berrien County Board of Commissioners to levy "unlimited taxes" to pay for the revenue bonds and operating cost of the recycling facility. No other public hearing was held to inform the public of this proposed pledge of taxes and the full faith and credit of Berrien County.

-7-

A newspaper ad was published in the Berrien County Press informing the public that a revenue bond hearing would be held with regard to revenue bonds and with regard to a contract and other matters. The public was not informed that the "contract," contrary to the information given the public at the public hearing, provided that the Berrien County Board of Commissioners would be required to levy taxes, unlimited in amount, to pay for the revenue bonds and operation of the facility. The

newspaper ad made no mention of the levy of taxes or of general obligation bonds and was not sufficient to inform the public that the "contract" provided for the pledge of taxes.

-8-

AMBAC Indemnity Corporation was the insurance company for the bonds and Trust Company Bank was the underwriter. Both of the latter named parties had, between them, numerous conversations with the chairman of the Berrien County Board of Commissioners concerning the proposed recycling plant. Intervenor AMBAC knew that the facility was highly speculative and would not provide sufficient revenues to retire revenue bonds. Trust Company Bank was aware of this fact also as were all other persons present at the validation hearing except the trial judge. Trust Company Bank and Intervenor AMBAC were also aware that the Berrien County Board of Commissioners had no monies to repay the approximately $1,000,000.00 loan obtained from the Trust Company Bank to purchase the Lundell System. Further, 1% sales tax monies and grant monies, granted for the construction of an agriculture show barn, were utilized on the recycling facility. There were no monies available to replace the 1% sales tax monies or the grant monies. The same law firm represented both the underwriter, Trust Company Bank and AMBAC Indemnity Corporation, the bond insurer, according to bond closing documents. The documents connected with the validation hearing were prepared by counsel for the insurance company and underwriter, including a several page Order purportedly validating the contract which provided for the levy of "unlimited taxes." The matter was presented to an out-of-

circuit judge, acting in the absence of the undersigned and Chief Judge W. D. Knight, as an uncontested matter. No evidence was presented and no argument made. The court was not informed of the highly speculative nature of the project nor was it informed that the public, at a public hearing, had been told that the operator of the facility would pay for the bonds. Further, neither the other two (2) commissioners nor the said court were informed of the fact that the chairman of the Commissioners, during 1988, was acting as a sales agent for the Lundell Company, who manufactured the Lundell Recycling System, on a commission basis. Further, neither the other two (2) board members nor the court were informed that sales tax monies and grant monies had been utilized by the Chairman to pay on the recycling system. The court was not informed that approximately $1,000,000.00 had been borrowed to pay for the recycling system which could not be repaid by Berrien County, Georgia, within the calendar year. This court finds, as a matter of fact, that there was a fraud upon the court at the validation hearing by a failure to inform the court of these factors. In signing the validation order, the record reveals that the court acted solely on representations made that the matter was uncontested, that all matters were in proper order and that this was just an ordinary run of the mill revenue bond issue. This court finds, as a matter of fact, that the project was not feasible and could not be operated in compliance with state and federal regulations. The court finds that the facility has never been in compliance with its permit from the state from the commencement of operations.

-9-

The court finds that the public did not have notice that the validation hearing would concern the levy of taxes by the Berrien County Board of Commissioners to pay for revenue bonds and the operation of the recycling facility.

-10-

The court finds that there was no referendum held to allow voters to approve or disapprove of the issuance of general obligation bonds with regard to the recycling facility.

-11-

The court finds that, with reference to the recycling facility and financing of same, a calculated effort was made to keep the voters of Berrien County from voting on whether or not a general obligation should be issued by the Berrien County Board of Commissioners. The court finds that the revenue bonds, with the purported agreement of the Berrien County Board of Commissioners to levy "unlimited taxes" was referred to by the underwriter and defendant AMBAC as a "back door" general obligation bond. The phrase "back door" general obligation bond was utilized to characterize the fact that a general obligation was being created without submission of same to the voters.

-12-

AMBAC Indemnity Corporation issued a municipal bond insurance policy insuring payment of the subject revenue bonds.

-13-

Plaintiffs seek a permanent injunction enjoining the Berrien County Board of Commissioners and the Berrien County Tax Commissioner from levying taxes to pay for the revenue bonds and operation of the recycling facility.

-14-

The fraud practiced upon the court and the agency relationship of chairman Joe Stallings with the Lundell Corporation was not discovered until the year of 1991.

-15-

The Berrien County Resource Recovery Development Authority did not provide services to the Berrien County Board of Commissioners with regard to the recycling plant. There was no lease involved.

CONCLUSIONS OF LAW

-1-

This court has jurisdiction of all parties and of the subject matter of this action. Venue is proper in this court. All parties have had opportunity to make claims against each other.

-2-

The bond validation proceedings, case number 88-C-332, in the Superior Court of Berrien County, Georgia, is not res judicata as to the issues before this court in this action. The parties in this action and in the former action are not the same. There is no identity of cause of action; there was a fraud upon the court and proper notice was

not given to the taxpayers of Berrien County, Georgia concerning the alleged new contract entered into and of the proposal to require the commissioners to levy "unlimited taxes" to pay for the bonds and operation of the facility. Due process was denied to plaintiffs and to the taxpayers of Berrien County. It is not necessary to declare the revenue bonds invalid in order to grant the relief requested by plaintiffs. This Court is not passing upon the validity of the revenue bonds but only whether or not the full faith and credit of Berrien County was validly pledged and whether or not the Berrien County Board of Commissioners and Tax Commissioners are required to and can levy taxes to pay for the revenue bonds and operation of the facility. The motion of defendant AMBAC to dismiss the complaint is denied.

-3-

Defendant AMBAC would occupy the same status as a bondholder upon payment to the bondholders because of a refusal or inability to pay by the Berrien County Resource Recovery Development Authority.

-4-

Article XIX, Section VI, Paragraph I of the Georgia Constitution prohibits the exercise of the power of taxation for the purpose of paying any part of the principal or interest on revenue bonds. O.C.G.A. Section 36-82-66 prevents the holder of any revenue bonds from compelling any exercise of the taxing power to pay for any such bonds. All revenue bonds must contain a recital setting this provision forth. Occupying the status of a bondholder, defendant AMBAC cannot require the Berrien

County Board of Commissioners to levy taxes to pay for the bonds.

-5-

The intergovernmental contract provision of the Georgia Constitution, Article XIX, Section III, Paragraph I, does not support defendant AMBAC's position. Defendant AMBAC relies upon the case of *Nations v. Downtown Development Authority,* 256 Ga. 158, 345 S.E.2d 581 (1986) as support for its position. That case does not require a decision in AMBAC's favor. This case is more akin to *Nations v. Downtown Development Authority,* 255 Ga. 324, 338 S.E.2d 240 (1985). In the second *Nations* case, the Supreme Court approved the particular contractual provision providing for lease payments by the City of Atlanta to the Downtown Development Authority. The City leased property from the Downtown Development Authority and obligated itself to make the lease payments through an intergovernmental contract. In the case at hand, there is no lease involved and the contractual provisions which are at issue are clearly for the sole purpose of requiring the Board of Commissioners to levy taxes to pay for the facility. At the time the subject contract was entered into, the facility had already been constructed and equipment paid for by the Berrien County Board of Commissioners. Defendants and the underwriter attempted to bring this situation into the second *Nations* case factual scenario but it is obvious that the purpose of the subject contractual provisions was to provide a "back door" general obligation bond. The intergovernmental contract constitutional provision was never meant to be a vehicle for a "back door" general obligation bond but, rather, is for the purpose of a bona fide government

contract. The alleged promise of the Berrien County Board of Commissioners contained within the agreement dated November 1st, 1988 was a clear promise to use its taxing power to pay for short falls due bondholders. This particular contractual provision is not a contract for services or joint services or for the joint or separate use of facilities or equipment as contemplated by Article XIX, Section III, Paragraph I of the Georgia Constitution. This particular contractual provision is the very thing which Article XIX, Section V, Paragraph I seeks to prohibit: new debt without the assent of a majority of the qualified voters of the county. It is important to note that the county's promise to levy unlimited taxes is unconditional and absolute and is not tied to the provision of services by the Berrien County Resource Recovery Development Authority. It clearly was not for the construction of the facility since the recycling facility had already been constructed and paid for by the Berrien County Board of Commissioners without a referendum. The subject contractual provisions actually provide a guarantee by the Berrien County Board of Commissioners of payment of the bond obligations. Guarantee of a revenue bond obligation is a debt which does not come within the exceptions created by the intergovernmental contracts clause and is therefore barred by the debt clause of the Georgia Constitution. O.C.G.A. Section 36-63-10 provides that revenue bonds issued by Resource Recovery Authorities shall not constitute an indebtedness or obligation of any county and that no holder of any bond or obligation shall ever have the right to compel any exercise of the taxing power of said county nor to enforce payment against any property of the state or of any such county.

The provisions of the agreement dated November 1st, 1988 whereby the Berrien County Board of Commissioners purportedly agreed to levy taxes to guarantee and pay for revenue bonds and the operation of the recycling facility, are invalid. Neither the Berrien County Board of Commissioners nor the Berrien County Tax Commissioner can levy taxes to pay for said revenue bonds. The Court hereby grants the Plaintiffs' request for a permanent injunction prohibiting the levy of taxes for payment of said bonds and operation of the Lundell System. Defendant Berrien County Board of Commissioners and the Berrien County Tax Commissioner are hereby permanently enjoined from levying taxes to pay for said bonds.

This 29th day of July, 1992.

/s/ Brooks E. Blitch, III
HONORABLE
BROOKS E. BLITCH, III
Judge, Superior Court
Berrien County, Georgia

IN THE SUPERIOR COURT OF BERRIEN COUNTY
STATE OF GEORGIA

BOBBY C. AKRIDGE, Sr., Individually, and on behalf of all other members of his class similarly situated,	*	CIVIL ACTION NO. 91-C-355
Plaintiff,	*	
vs.	*	
BERRIEN COUNTY BOARD OF COMMISSIONERS AND LORENE T. DORMINEY, in her official capacity as Tax Commissioner of Berrien County, Georgia,	*	
Defendants.	*	

COMPLAINT

COMES NOW PLAINTIFF Bobby Akridge, on behalf of himself individually and all other members of his class similarly situated, and files this complaint against said defendants as follows:

* * *

-4-

The rights of plaintiff and the class members involve common questions of law and fact relating to the levy of taxes by the Berrien County Board of Commissioners; the collection of taxes by Lorene T. Dorminey and the levy and sale of property for failure to pay taxes by Lorene T. Dorminey. The common questions of law and fact are as follows:

(a) Has the Berrien County Board of Commissioners violated Article IX, Section V, Paragraph Ia of the 1983 Georgia Constitution which sets certain debt limitations that can be incurred by any county? Said constitutional paragraph provides that no county shall incur any debt without the assent of a majority of the qualified voters of said county. There is a question as to whether or not the Berrien County Board of Commissioners has violated Article IX, Section V, Paragraph I of the Georgia Constitution by incurring debt without a referendum wherein a majority of the qualified voters of Berrien County assented to the creation of the new debt. Specifically, but not limited thereto, the Berrien County Board of Commissioners have incurred debt by virtue of, at least, five separate promissory notes totaling in excess of $1,000,000.00 in the year of 1988, without a referendum and in violation of the Georgia Constitution. The Berrien County Board of Commissioners did, on September 19, 1988, enter into a purported contract with the Berrien County Resource Recovery Development Authority to fund the operation of a recycling plant, which was, in fact and law, a project of the Berrien County Board of Commissioners, thereby creating illegal debt. Further, the Berrien County Board of Commissioners did enter into a purported contract dated November 1, 1988 wherein it created illegal debt on behalf of the Berrien County Board of Commissioners and Berrien County, Georgia and agreed to levy such annual ad valorem taxes, "unlimited as to amount," to operate the recycling facility constructed by the Berrien County Board of Commissioners and operated by the Berrien County Board of Commissioners on a day to day basis. This was illegally done in

violation of Article IX, Section I, Paragraph VI of the Georgia Constitution which prohibits utilization of the power of taxation for the purpose of paying any part of the principal or interest of any revenue bonds in violation of O.C.G.A. Section 36-82-66.

* * *

CAUSES OF ACTION

COUNT ONE

-1-

The Berrien County Board of Commissioners has, in the past, and is currently illegally paying monies from the general funds of Berrien County, Georgia and has illegally levied and assessed ad valorem taxes to operate a recycling plant in Berrien County, Georgia.

-2-

The illegal payments result from numerous promissory notes made by the Berrien County Board of Commissioners in violation of the Constitution of the state of Georgia, specifically Article IX, Section V, Paragraph I of the 1983 Georgia Constitution. Further, the Berrien County Board of Commissioners has entered into purported contracts whereby the Berrien County Board of Commissioners has pledged the levy of unlimited ad valorem taxes to operate the recycling plant in Berrien County, Georgia, all without a referendum as required by the Georgia Constitution whereby a majority of the qualified voters of Berrien County, Georgia would be required to assent to such debt.

The Berrien County Board of Commissioners has illegally agreed to pay out of ad valorem taxes and has agreed to levy ad valorem taxes to pay for revenue bonds issued by the Berrien County Resource Recovery Development Authority.

* * *

IN THE SUPERIOR COURT OF BERRIEN COUNTY
STATE OF GEORGIA

BOBBY C. AKRIDGE, SR., et al., Plaintiffs, v. BERRIEN COUNTY BOARD OF COMMISSIONERS, et al., Defendants, v. AMBAC INDEMNITY CORPORATION, Defendant-Intervenor.	)	CIVIL ACTION NO. 91-C-355

MOTION TO DISMISS

Defendant-intervenor AMBAC Indemnity Corporation moves the Court for an order dismissing plaintiffs' complaint on the grounds that the claims asserted therein are barred by res judicata. Attached hereto as Exhibit A in support of this motion is a certified copy of the record in the bond validation proceeding styled *State of Georgia v. Berrien County Resource Recovery Development Authority and Berrien County, Georgia,* Civil Action No. 88-C-332, Superior Court of Berrien County. The Validation Order entered by this Court in that case on December 1, 1988, from which no appeal was taken, is conclusive on the question of validity of the Berrien County Resource Recovery Development Authority Revenue Bonds, Series 1988, and the contract given as security therefor by Berrien County, which plaintiffs challenge in this action.

WHEREFORE, AMBAC respectfully prays that its motion be granted and that plaintiffs' complaint be dismissed.

* * *

Respectfully submitted,

/s/ D. Robert Cumming, Jr.
D. Robert Cumming, Jr.
Georgia Bar No. 201500

/s/ R. Michael Robinson
R. Michael Robinson
Georgia Bar No. 610686

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/s/ Thomas C. Chambers, III
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Attorneys for AMBAC Indemnity Corporation

PUBLISHER'S AFFIDAVIT

STATE OF GEORGIA

COUNTY OF BERRIEN

I, S.T. Hamilton, DO HEREBY CERTIFY that I am publisher of The Berrien Press, the newspaper in which sheriff's advertisements appear for Berrien County, Georgia, and the attached notice of a bond validation hearing was published in said newspaper on November 16 and November 23, 1988.

/s/ S.T. Hamilton
Publisher

November 16, 1988 – NASHVILLE GEORGIA – THE BERRIEN PRESS – 13

LEGAL ADVERTISEMENTS

NOTICE TO THE PUBLIC

YOU ARE HEREBY NOTIFIED that on the 1st day of December, 1988, at 10:00 a.m., at the Berrien County Courthouse in the City of Nashville, Georgia, the presiding Judge of the Superior Court of Berrien County will hear the case of the STATE OF GEORGIA v. BERRIEN COUNTY RESOURCE RECOVERY DEVELOPMENT AUTHORITY AND BERRIEN COUNTY, GEORGIA, Civil Action File No. 88-C-332, in the Superior Court of Berrien County, the same being a proceeding to confirm and validate an issue of Berrien County Resource Recovery Development Authority Revenue Bonds, Series 1988 (the "Series 1988 Bonds"), in the aggregate principal amount of $2,000,000 to be issued by the Berrien County Resource Recovery Development Authority (the "Issuer") for the

purpose of financing (I) the cost of acquiring, constructing, installing and equipping a resource recovery system in Berrien County, Georgia (as initially acquired, constructed, installed and equipped, the "1988 Project"; as it now exists and as it may hereafter be modified, added to or extended, the "System") of the Issuer, (II) the cost of finding a debt service reserve for the Series 1988 Bonds, (III) interest on the Series 1988 Bonds for a period of approximately one year, and (IV) the cost of issuing the Series 1988 Bonds and the expenses incident thereto (including the cost of a bond insurance policy). In said proceeding, the Court will also pass upon the validity of (I) a Contract, dated, as of November 1, 1988, between the Issuer and the County, relating, among other things, to the payment of the Series 1988 Bonds, and (II) a Resolution of the Issuer in connection with the issuance of the Series 1988 Bonds.

Any citizen of the State of Georgia residing in Berrien County, Georgia, or any other person wherever residing who has a right to object, may intervene and become a party to this proceeding.

This 15th day of November, 1988.

Bonnie Murphy
Clerk, Superior Court,
Berrien County, Georgia

Nov. 16, 23

IN THE SUPREME COURT OF GEORGIA

AMBAC INDEMNITY CORPORATION,	*	
Appellant,	*	Case No.
vs.	*	S92A1513
BOBBY C. AKRIDGE, SR., et al.,	*	
Appellees.	*	

BRIEF OF APPELLEES

Berrien L. Sutton
Attorney for Appellees
Sutton & Associates
305 W. Dame Avenue
Post Office Box 496
Homerville, Georgia 31634
Ph.: (912)/487-5273
Georgia Bar No.: 693450

* * *

The issues presented are as follows:

* * *

3. Were Appellees given due process notice that unlimited taxes were being pledged?

* * *

Making the validation order on the revenue bonds conclusive upon Appellees in this case would be a denial of due process to Appellees since they had no notice that a general obligation was involved.

* * *

The validation order, with reference to the levy of taxes, could not be enforceable against these Appellees unless there was proper notice given. There was no proper notice given. Further, a void judgment may be attacked at any time when it becomes material to the interest of the parties to consider it and the statute of limitations has no application to this class of judgment. *Wasden v. Ruscon Industries,* 233 Ga. 439, 211 S.E.2d 733 (1945).

Appellant AMBAC argues that, because the trial court signed its "validation order" which had language that notice was proper, Appellees are somehow bound by it even though they had no proper notice of the proceedings and were not parties to the case. No ruling of a Court to which persons were not properly made parties can be res judicata upon those persons.

With regard to due process, the case of *Youngblood vs. State,* 259 Ga. 864, 388 S.E.2d 671 (1990) held as follows:

> "Due process requires that notice be given in a way calculated to allow interested parties to protect their rights."

Hollis v. Tanner, 177 Ga. App. 759, 761, 341 S.E.2d 290 (1986), cited by the *Youngblood* court, held that:

> "Whenever notice is required to be given in a judicial or administrative proceeding, due process requires that it be such noticed as is reasonably calculated, under all the circumstances, to enable the interested parties to protect their rights."

A cursory review of the notice published in the Berrien Press shows that there is nothing in that notice that would indicate to taxpayers that the County was pledging property taxes in an unlimited amount to pay for the recycling plant, especially in light of the fact that a previous public hearing had indicated that the bonds would be paid for by the operator of the facility and the only supplement would be a "garbage fee."

The fact that the November 1, 1988 contract was mentioned does not give notice of the fact that taxes were being pledged in an unlimited amount to pay for the bonds under the circumstances of the case. Obviously a contract had to be entered into with regard to diposal of garbage and payment of tipping fees, the revenues from which would be used to pay bonds. The source of payment of revenue bonds is revenues from the facility and there has to be contracts to generate revenues. That is nothing new with regard to revenue bonds. What is new to taxpayers is the fact that revenue bonds are used as a "back door general obligation" bond under the practice of some underwriters and bonding companies like appellant AMBAC. The tax payers should not have to assume that the courthouse records should be searched when a revenue bond notice is given. It has long been the law that taxes can not be levied for revenue bonds and there is nothing in the notice to indicate that anything different with reference to these revenue bonds.

IN THE SUPREME COURT OF GEORGIA

AMBAC INDEMNITY CORPORATION,	*	
Appellant,	*	Case No.:
vs.	*	S92A1513
BOBBY C. AKRIDGE, SR., et al.,	*	
Appellees.	*	

SUPPLEMENTAL BRIEF OF APPELLEES

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* * *

B. (NOTICE AND DUE PROCESS)

Appellant relies upon the case of *Charlton Development Authority v. Charlton County*, 253 Ga. 208, 317 S.E. 2d 204 (1984) for its prior adjudication argument. However, the *Charlton County* case does not stand for the proposition that the prior bond validation procedure in Berrien County is binding as to the issues in this case. The *Charlton County* case is inapplicable since Charlton County was actually a party to the tax levy agreement and had "actual knowledge and statutory notice of the validation proceedings." Charlton County never contended that it did not have actual and legal notice of

validation proceedings. Charlton County had the opportunity to raise all issues in the first proceedings that occurred. Since it failed to do so, this court held that Charlton County was barred from relitigating the issues. However, Berrien County taxpayers did not have actual knowledge of the agreement to levy unlimited taxes and were not parties to the tax levy agreement. The notice in the newspaper did not adequately inform taxpayers of the agreement to levy unlimited taxes so that the taxpayers could protect their rights.

Due Process requires that notice be given in a way calculated to allow interested parties to protect their rights. *Hollis v. Tanner,* 177 Ga. App. 759, 761, 341 S.E. 2d (1986); *Youngblood v. State,* 259 Ga. 864, 388 S.E. 2d 671 (1990). Such notice was not given in this case. Taxpayers in Berrien County were informed at the June 1988 public hearing that the operator of the facility would pay the revenue bonds; the notice in the newspaper did not state anything to the contrary and did not mention levy of taxes or full faith and credit. (R 149-151; 180; 559). With reference to the pledge of full faith and credit of Berrien Count to pay for the revenue bonds and operation of the facility with a tax levy, the notice was inadequate as such a pledge made the bonds general obligation bonds which must be issued only with voter consent. In fact, the revenue bond validation petition described the bonds as constituting a debt, general obligation, and pledge of full faith and credit of Berrien County, Georgia. The petition further stated that bondholders would not have the right to compel the taxing power of the state but would have the right to compel the exercise of the taxing power of

Berrien County. (R 61-62, Paragraph 12 of Petition). Taxpayers were given no notice of a general obligation bond. A judgment is void if the court which rendered it acted in a manner materially inconsistent with due process. *Johnson v. Mayor and City Council of the City of Carrollton*, 249 Ga. 173, 288 S.E. 2d 565 (1982).

The revenue bonds were not revenue bonds in the traditional sense but were clearly general obligation bonds which required a referendum. Taxpayers were given no notice of a contract requiring levy of taxes. Under the facts and circumstances of this case, there was nothing to put taxpayers on notice of the pledge of the full faith and credit of Berrien County, Georgia and the agreement to levy unlimited taxes for up to fifty years. Appellees were denied due process notice and should not be bound by the consent judgment entered in the revenue bond validation proceeding.

IN THE SUPREME COURT OF GEORGIA

CASE NO. S92A1513

AMBAC INDEMNITY CORPORATION,

Appellant,

v.

BOBBY C. AKRIDGE, SR., *et al.*,

Appellees

BRIEF OF AMICUS CURIAE GEORGIA CENTER FOR LAW IN THE PUBLIC INTEREST, INC.

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* * *

Where taxpayers are to be ultimately liable for payment of principal and interest on bonds, and where taxpayers are not afforded an opportunity to consent to the bond issue through a referendum, due process requires that the taxpayers be provided reasonable notice of the bond issue. Due process requires that such notice be reasonably calculated, under all the circumstances, to

enable the interested parties to protect their rights. *Hollis v. Tanner,* 177 Ga. App. 759, 341 S.E.2d 290 (1986). Therefore, due process was not satisfied in the present case because the notice failed to inform interested parties (taxpayers of Berrien County) as to how their interests would be affected by proposed bond issue. In other words, due process required that the taxpayers of Berrien County be informed that their property would be subject to taxation under the terms of the intergovernmental contact attendant to the issuance of the revenue bonds.

The trial court specifically held, "the public did not have notice that the validation hearing would concern the levy of taxes by the Berrien County Board of Commissioners to pay for revenue bonds and the operation of the recycling facility." (Order at Finding of Fact 9; R-2607). The trial court ruled that due process was denied to plaintiffs and to the taxpayers of Berrien County because "proper notice was not given to the taxpayers of Berrien County, Georgia concerning the alleged new contract entered into and of the proposal to require the commissioners to levy 'unlimited taxes' to pay for the bonds and operation of the facility." (Order at Finding of Law 2; R-2607). Appellant suggests that the inclusion of a copy of the notice and a publisher's affidavit showing the publication of the notice satisfied due process, despite the failure of the notice to make any mention about a potential levy of taxes. Appellant contends that "the published notice of the bond validation hearing exceeded the requirements of the Revenue Bond Law and clearly satisfied the dictates of constitutional due process." Brief of Appellant at 20. In support of this proposition, Appellant cites the case of *Youngblood v. State,* 259 Ga. 864, 368

S.E.2d 671 (1990). However, the *Youngblood* case merely holds that compliance with the notice provisions of O.C.G.A. § 36-82-76 and O.C.G.A. § 36-82-77(a) satisfies due process. The challenge in *Youngblood* was to the adequacy of the statutory requirements themselves, while the present case concerns a challenge to the adequacy of the political subdivision's compliance with statutory notice requirements. *Youngblood* did not address a challenge to the sufficiency of the language of the notice. Appellees contend that the notice of the Berrien County bond validation proceeding, which contained a mere facial allegation of compliance with notice requirements with regard to time and place, failed to comply with the due process requirements of O.C.G.A. §§ 36-82-76 *et seq.* The notice failed to apprise the taxpayers, among other things, that taxes were implicated in the bond transactions. As this Court has stated:

> When the facts appear in such a manner as to evoke a judgment that the requirements of the law have been met, validation follows under the terms of the act; but general admissions in the pleadings do not authorize a judgment of validation. Such we take to be the spirit and meaning of the constitutional and statutory requirements incident to the issue of bonds by a county or municipal corporation.

Smith v. Mayor of Dublin, 113 Ga. 833, 841, 39 S.E. 327, 330 (1901).

"[R]egardless of the type of action, due process requires that a chosen method of service be reasonably certain to inform those affected." *Johnson v. Mayor & City Council of the City of Carrollton*, 249 Ga. 173, 175, 288

S.E.2d 565, 567 (1982). In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), the Supreme Court recognized that notice should acquaint interested parties that their rights are before a court. The Court further noted that, "within the limits of practicability, notice must be such as is reasonably calculated to reach interested parties." *Id.* at 318. While the *Johnson* and *Mullane* decisions addressed the adequacy of publication as a means of providing notice, the decisions make it clear that due process requires that the notice not only reach interested parties, but that the notice must also satisfy a notice content requirement that such notice acquaints interested parties that their rights are before a court. "[Due process] requirements are satisfied if [the taxpayer] has reasonable notice and opportunity to be heard, and to present his claim or defense, *due regard being had to the nature of the proceeding and the character of the rights which may be affected by it.*" *Hancock v. Board of Tax Assessors of Harris County*, 226 Ga. 570, 570, 176 S.E.2d 102, 103 (1970) (emphasis supplied) (quoting *Zorn v. Walker*, 206 Ga. 181, 182, 56 S.E.2d 511, 512 (1949). The notice in the Berrien county case clearly failed to comply with due process requirements because the notice failed to inform taxpayers that their rights as taxpayers, subject to tax levies by the County, were to be affected in the proceeding.

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APPELLANT,	*	CASE NO.:
VS.	*	S92A1513
BOBBY C. ACKRIDGE, SR., ET AL.,	*	
APPELLEES.	*	

MOTION FOR RECONSIDERATION

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* * *

With regard to the revenue bonds themselves, which same were not invalidated, notice was sufficient under statutory procedures for pure revenue bonds. However, the validity of revenue bonds has never been at issue in this case. The sole and only issue concerns the validity of those paragraphs in the intergovernmental contract which provide for the pledge of full faith and credit. Absolutely no notice was given to taxpayers that a hearing would be held to determine the validity of the clause pledging the full faith and credit of Berrien County, Georgia. Taxpayers were entitled to notice in this regard so that taxpayers could contest the pledge of the full faith and credit. Due process has been denied the taxpayers of

Berrien County, Georgia and, since the validity of the revenue bonds themselves are not at issue, this Court should reconsider its decision, set forth what due process notice is required with regard to the pledge of full faith and credit under the intergovernmental contracts clause and affirm the decision of the trial court. "Due process requires that a chosen method of service be reasonably certain to inform those affected." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 312, 70 S.Ct. 652 (1950). The main purpose of the intergovernmental contract in this case was to pledge the full faith and credit of Berrien County, Georgia. No effort was made to be reasonably certain that taxpayers were informed that a hearing would be held to determine the validity of such a pledge. Due process under the Fifth Amendment to the United States Constitution, and under our Georgia Constitution, required that such notice be given.

* * *